

**COURT REPORTERS**  
**OF AKRON CANTON AND CLEVELAND**

Transcript of the Testimony of  
**Robert W. Vitale**

**Taken On:** February 19, 2008  
**Case Number:** 2:06-CV-2141-DGC

**Case:** Soilworks, LLC, vs. Midwest Industrial Supply, Inc.,

Court Reporters of Akron Canton and Cleveland  
Phone: 800-804-7787  
Fax: 330-666-9833  
Email: [reporters@compuserve.com](mailto:reporters@compuserve.com)  
Internet: [www.courtreportersinc.com](http://www.courtreportersinc.com)

UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF ARIZONA

- - -

SOILWORKS, LLC, an Arizona )	
corporation, )	
Plaintiff, )	
vs. )	CASE NO.
MIDWEST INDUSTRIAL SUPPLY, )	2:06-CV-2141-DGC
INC., an Ohio corporation )	ATTORNEYS' EYES
authorized to do business )	ONLY PORTIONS
in Arizona, )	CONTAINED WITHIN
Defendant. )	

- - -

Deposition of ROBERT W. VITALE, a witness herein, called by the Plaintiff for Examination pursuant to the Federal Rules of Civil Procedure, taken before me, the undersigned, Binnie Purser Martino, a Registered Diplomate Reporter, Certified Realtime Reporter and Notary Public in and for the State of Ohio, pursuant to Notice and agreement of counsel at the law offices of Vorys, Sater, Seymour and Pease, LLP, First National Tower, 106 South Main Street, Suite 1100, Akron, Ohio, on Tuesday, the 19th day of February, 2008, commencing at 9:50

1 o'clock a.m.

2 - - -

3

4 **APPEARANCES:**

5

6 On Behalf of the Plaintiff:

7 KUTAK ROCK LLP

8 BY: E. Scott Dosek, Attorney at Law

9 Suite 300

10 8601 North Scottsdale Road

11 Scottsdale, Arizona 85253-2742

12 480/429-5000

13

14 On Behalf of the Defendant:

15 BROUSE McDOWELL

16 BY: John M. Skeriotis Attorney at Law

17 388 South Main Street, Suite 500

18 Akron, Ohio 44311-4407

19 330/535-9999

20 - - -

21

22

23

24

25

## I N D E X

1		
2		
3		
4	EXAMINATION (By Mr. Dosek)	4
5		
6		
7	Plaintiff's Exhibit 1	4
8	Plaintiff's Exhibits 2 and 3	70
9	Plaintiff's Exhibit 4	77
10	Plaintiff's Exhibit 5	84
11	Plaintiff's Exhibit 6	85
12	Plaintiff's Exhibit 7	87
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1                   (Thereupon, Plaintiff's Exhibit 1 of  
2                   the R.W. Vitale deposition was marked  
3                   for purposes of identification.)

4                   ROBERT W. VITALE  
5   of lawful age, a witness herein, having been  
6   first duly sworn, as hereinafter certified,  
7   deposed and said as follows:

8                   EXAMINATION

9   BY MR. DOSEK:

10   Q.   State your full name, please.

11   A.   Robert William Vitale.

12   Q.   You are not related to Dick, are you?

13   A.   No.

14   Q.   You have probably never been asked that  
15   before, have you?

16   A.   No.

17   Q.   Sir, what is your date of birth?

18   A.   August 31st, '42.

19   Q.   Have you ever had a deposition taken  
20   before?

21   A.   I have.

22   Q.   How many times?

23   A.   Five.

24   Q.   When is the last time?

25   A.   About, I think, three years ago.

1 Q. Okay. Were those previous depositions that  
2 you have given in connection with your business?

3 A. Correct.

4 Q. Let me just give you a little bit of  
5 background, so that we have our ground rules set  
6 for today.

7 I will be asking you a series of questions,  
8 and everything that we say here today is going  
9 to be recorded by the court reporter. You  
10 understand that, don't you?

11 A. Correct.

12 Q. And because she is taking down everything  
13 that we say, it is difficult for her to record  
14 two people talking at one time. So I am going  
15 to ask you to try to wait until I am finished  
16 with a question before you give me an answer. I  
17 will try to wait until you are finished with the  
18 answer before I ask the next question. Fair  
19 enough?

20 A. Fair enough.

21 Q. Also, because she is taking down what we  
22 say today, it is important that we speak in  
23 verbal words, rather than a shake of the head or  
24 a nod of the head, which is more common in  
25 everyday discourse. You understand that, don't

1     you?

2     A.     Yes.

3     Q.     You took an oath swearing to tell the  
4     truth, to truthfully answer the questions that I  
5     ask you today. You understand that, don't you?

6     A.     Yes.

7     Q.     Have you ever testified in court before?

8     A.     Yes.

9     Q.     You understand that the oath you took today  
10    is the same oath that you would take in a court  
11    of law?

12    A.     Yes.

13    Q.     If I ask you any question today that you  
14    don't understand -- and, frankly, that is  
15    likely -- please ask me to rephrase the question  
16    or ask it in a different way so that when you  
17    give me an answer, I will know that it is an  
18    answer to a question that you do understand.  
19    Fair enough?

20    A.     Fair enough.

21    Q.     Then when we are done today, we will know  
22    that all of the answers that you have given me  
23    have been truthful answers to questions that you  
24    understood. Okay?

25    A.     Yes.

1 Q. Okay. What is your occupation?

2 A. CEO of Midwest Industrial Supply,  
3 Incorporated.

4 Q. How long have you held that position?

5 A. From the time I started the business in  
6 1975.

7 Q. Give me a summary of your educational  
8 background, beginning with your graduation from  
9 high school.

10 A. I graduated from Central Catholic High  
11 School in Canton in 1960, went to St. Joseph's  
12 College in Rensselaer, Indiana, for a year. I  
13 transferred to Walsh College in Canton, Ohio,  
14 and attended there approximately three years or  
15 four.

16 I have attended Harvard Business School's  
17 program known as OPM, Owners and Presidents  
18 Management Program.

19 Q. Did you attain any kind of degree or  
20 certification from St. Joseph's?

21 A. No.

22 Q. Did you attain any sort of degree or  
23 certification from Walsh College?

24 A. No.

25 Q. What was your course of study at



1 St. Joseph's?

2 A. Basic liberal arts program.

3 Q. Okay. How about at Walsh College?

4 A. Concentration on business-related programs  
5 from accounting, economics.

6 Q. Were you pursuing a business degree? Let  
7 me ask it a little bit differently. Was the  
8 course of study that you were pursuing one that  
9 was designed to lead to a business degree?

10 A. Yes, my interest was business.

11 Q. And did you attend college immediately  
12 after graduation from high school?

13 A. Yes.

14 Q. So the time that you spent in college was  
15 early '60s, it looks like, '61 to '65, something  
16 like that?

17 A. Approximately, yes.

18 Q. Have you ever served in the military?

19 A. No.

20 Q. When did you attend the OPM program at  
21 Harvard?

22 A. Around 1988, I believe.

23 Q. What is the scope of that program? First  
24 of all, how long does it last?

25 A. It is a three-year program that lasts three

1 Q. In the same position the whole time you  
2 were there?

3 A. Yes.

4 Q. What did you do then?

5 A. I think that is when I started Midwest  
6 Industrial Supply, which would be approximately  
7 1975.

8 Q. When you started Midwest Industrial Supply,  
9 was that in Canton?

10 A. Correct.

11 Q. Is that a business that you started from  
12 scratch, or was it previously existing?

13 A. The corporate shell, Midwest Industrial  
14 Supply, Inc., was a previously existing  
15 corporate entity. Myself, along with two other  
16 people, you know, had it become active.

17 Q. Who are those two other people?

18 A. Dick Morena, M-o-r-e-n-a, and Tom  
19 Woischnik, W-u-i-s-c-h-n-i-k. That may not be  
20 the correct spelling.

21 Q. Okay. So in approximately '75, you and  
22 Mr. Morena and Mr. Woischnik acquired the rights  
23 to Midwest Industrial Supply. Did you purchase  
24 stock?

25 A. They had formed the corporation and, you

1 know, had it sitting dormant. I had a business  
2 idea that they funded, and that we went  
3 together. They were the owners at that time,  
4 and I embarked upon trying to develop the  
5 business that at that time I had in mind.

6 Q. Okay. When you say "they" in that answer  
7 to the last question, are you referring to  
8 Mr. Morena and Mr. Woischnik?

9 A. Yes.

10 Q. Are they still involved in Midwest  
11 Industrial Supply?

12 A. No.

13 Q. What was the business idea that you had in  
14 mind when you got involved with Midwest  
15 Industrial Supply?

16 A. The sale of chemical products to coal  
17 mining companies and power plants.

18 Q. What particular type of chemical products?

19 A. At the time, I had no idea, but was  
20 focusing more on those markets, coal mining and  
21 power plants.

22 Q. What type of need was it that you saw in  
23 the coal mining industry or in power plants that  
24 you were attempting to fulfill?

25 A. I didn't know the need. I saw in the coal

1 the dust control business?

2 A. No. It would be a wild guess.

3 Q. Are you the biggest player in that market?

4 A. We are a large player.

5 Q. If you are not the biggest, who is?

6 MR. SKERIOTIS: Objection.

7 THE WITNESS: You know, there  
8 could be larger players that would fit under the  
9 major corporate umbrella, such as Nalco or --  
10 and I just don't know how much business they  
11 have, how much they do, versus what we do.

12 BY MR. DOSEK:

13 Q. Is there a trade association for the dust  
14 control industry?

15 A. Not specifically.

16 Q. Okay. Does Midwest market and distribute  
17 its products nationwide?

18 A. Yes.

19 Q. All 50 states, to your knowledge?

20 A. Yes.

21 Q. Does Midwest consider Soilworks to be a  
22 major competitor?

23 A. We consider Soilworks to be a competitor.

24 Q. To your knowledge, does Soilworks  
25 distribute its products nationwide?

1     A.     I would expect that they do.

2     Q.     So in other words, you would consider  
3     Soilworks to be a competitor all across the  
4     country wherever you do business?

5     A.     Yes.

6                     (Thereupon, Plaintiff's Exhibit 5 of  
7                     the R.W. Vitale deposition was marked  
8                     for purposes of identification.)

9     BY MR. DOSEK:

10    Q.     Mr. Vitale, I am showing you what has been  
11    marked as Exhibit Number 5. This is identified  
12    as Midwest Industrial Supply's Rule 26  
13    disclosures.

14             Do you recall ever having seen that  
15    document before?

16    A.     I can't recall specifically when, but I am  
17    sure that I have.

18    Q.     Okay. Just a couple of questions with  
19    regard to this document. It identifies on page  
20    2 at the bottom, as a person who may have  
21    knowledge of facts that are relevant to this  
22    case, a Kathy Motter. Who is Kathy Motter?

23    A.     Kathy Motter was a former employee that was  
24    in our marketing, material, design and creation  
25    and now is a contract services provider to

1 the second set of interrogatories?

2 A. Let me read what the questions are, then I  
3 will give you a good indication.

4 Q. Okay.

5 (Pause.)

6 A. I would say it is unlikely to be anybody  
7 else but myself.

8 Q. Okay. I would like to direct your  
9 attention to interrogatory number 1, which is on  
10 page 2, which asks, "Does any Soilworks product  
11 infringe U.S. patent number 7,081,270?"

12 And the answer essentially on the top of  
13 the next page says, "From the available public  
14 information, yes."

15 That was your answer, correct?

16 A. Correct.

17 Q. What available public information are you  
18 referring to there?

19 A. The Soilworks Material Safety Data Sheet  
20 for Durasoil, Soilworks bidding, for instance,  
21 Alaska Department of Transportation, where there  
22 is a clear specification for what is called for.

23 There is multiple military agencies, but  
24 handbook which would, if correct, indicate a  
25 patent infringement.

## C E R T I F I C A T E

STATE OF OHIO, )  
 ) SS:  
SUMMIT COUNTY, )

I, Binnie Purser Martino, a Registered  
Diplomate Reporter, Certified Realtime Reporter  
and Notary Public within and for the State of  
Ohio, duly commissioned and qualified, do hereby  
certify that the within named witness, ROBERT W.  
VITALE, was by me first duly sworn to testify  
the truth, the whole truth and nothing but the  
truth in the cause aforesaid; that the testimony  
then given by him was by me reduced to Stenotype  
in the presence of said witness, afterwards  
prepared and produced by means of Computer-Aided  
Transcription and that the foregoing is a true  
and correct transcript of the testimony so given  
by him as aforesaid.

I do further certify that this deposition  
was taken at the time and place in the  
foregoing caption specified, and was completed  
without adjournment.

I do further certify that I am not a  
relative, employee of or attorney for any party  
or counsel, or otherwise financially interested  
in this action.

I do further certify that I am not, nor is  
the court reporting firm with which I am  
affiliated, under a contract as defined in Civil  
Rule 28(D).

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my seal of office at Akron,  
Ohio on this 26th day of February, 2008.

*Binnie Purser Martino*

Binnie Purser Martino, RDR, CRR

My commission expires June 27, 2009.

- - -